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No. 09-1578

Supreme Court, U.S.
FILED
OCT 18 2010
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

ALTUS FINANCE S.A., *et al.*,
Petitioners,

v.

AIG RETIREMENT SERVICES, INC.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF FOR THE PETITIONERS

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October 18, 2010

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

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REPLY BRIEF FOR THE PETITIONERS

Contrary to AIG's contention that this case presents no question of federal law appropriate for review, the Petition raises two important questions concerning the power of district courts to resolve implausible claims before trial:

- First, whether a district court may properly address the plausibility of a claim for relief pursuant to the standards established in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), and *Ashcroft v. Iqbal*, 556 U.S. ___, 129 S. Ct. 1937 (2009), when ruling on a motion for summary judgment under Rule 56

as well as a motion to dismiss under Rule 12; and

- Second, resolving a split of circuit court authority, whether a district court, in ruling on a motion under Rule 12, may refuse to credit allegations in an amended complaint that conflict with allegations in an earlier version of that complaint where no plausible explanation is offered for the amendment.

The Ninth Circuit concluded that the district court's rulings under both Rule 12 and Rule 56 were "premature." Resolving the issues of the district courts' authority in these contexts is important to the fair and efficient administration of justice not only within the Ninth Circuit, but nationwide, because a ruling by this Court will define further and strengthen the district courts' critical gatekeeper role to weed out implausible claims before trial through the mechanisms of Rules 12 and 56.

In its Opposition, submitted after it was directed to do so by the Court, AIG does not substantively address these legal issues but rather argues factual issues that are irrelevant to both resolution of the Petition and the issues that would be before this Court if it were granted.[1] Contrary to AIG's position, the legal issues are important to the administration of justice in the federal courts, straightforward, properly preserved, and merit review. The Ninth Circuit ruled that the district court acted "prematurely"

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[1] AIG's unfortunate resort to disparaging characterizations of the merits of the Petition (including absurdly terming it potentially the least meritorious petition on the Court's docket this Term) is bereft of substance and lends nothing to this Court's consideration of the Petition.

when it determined that certain of AIG's claims were implausible on the pleadings and, after careful inquiry and analysis following extensive discovery, granted summary judgment on the remaining fraud claims when it determined that AIG's proffered chain of causation lacked plausibility in fact. *Twombly*, 550 U.S. at 570; *Iqbal*, 129 S. Ct. at 1950.

If allowed to stand, the Ninth Circuit's ruling that the district court acted "prematurely" will vitiate this Court's jurisprudence that deems implausible claims not fit for trial. By granting certiorari, this Court can not only correct the Ninth Circuit's erroneous rulings allowing AIG's implausible claims to proceed, but also expressly extend significant aspects of its Rule 12 jurisprudence to analogous analysis undertaken in the Rule 56 context.

Likewise, the Ninth Circuit's reversal of the Rule 12 statute of limitations dismissal as "premature" reflects a determination that a district court lacks authority under Rule 12 to disregard a factual allegation in an amended complaint where the amended allegation directly contradicts a factual allegation in a prior iteration of the complaint, without plausible explanation, and is made to avoid an admission fatal to its claims. Not only does this ruling conflict with the teachings of *Twombly* and *Iqbal*, but it also illustrates a split between the Ninth Circuit, which would preclude district courts under Rule 12 from disregarding conflicting, amended allegations in successive pleadings, and the Federal Circuit, which would permit, but not require, district courts to disregard and strike conflicting allegations in appropriate circumstances, such as those present in this case. Resolution of this issue goes to the heart of the power

of the district court to address such conflicting allegations in the context of Rule 12.

AIG's misstatements and mischaracterizations of the factual record, which was fully and carefully analyzed by the district court, the conclusions of which were not examined or addressed in the Ninth Circuit's opinion, are irrelevant to a proper consideration of the legal questions presented in the Petition. Moreover, for the reasons explained in the Petition and below, AIG's attempt to present a smokescreen of fact issues cannot obscure that the questions of federal law presented are properly preserved and merit review.

I. Whether a District Court May Assess the Plausibility of a Claim When Ruling on Summary Judgment Is Properly Presented and Merits Review

AIG contends that no question concerning the proper standards for summary judgment is properly presented, and that the issue has been waived. Opp. 20, 21. Both contentions are wrong.

First, AIG suggests that no question concerning Rule 56 standards is presented because Petitioners "are complaining about the court of appeals' application of state-law causation and reliance standards to the summary judgment evidentiary record on [AIG]'s fraud claims." Opp. 22. Petitioners are not complaining about state law issues, or the Ninth Circuit's interpretation and application of state law. The Ninth Circuit simply did not conclude, as AIG asserts, that AIG "had adduced sufficient evidence for a fact finder to find causation and reliance under governing state-law standards." Opp. 22.

Rather, the Ninth Circuit concluded that the district court acted "premature[ly]" in granting summary judgment to Defendants. App. 3a, 4a, 5a. As explained in the Petition, in assessing AIG's fraud claims, including notably the long string of AIG's predicted events that would have needed to occur for AIG to have succeeded in obtaining the two-thirds of NCLH that it did not previously purchase, the district court expressly invoked the concept of plausibility. App. 48a. The district court ultimately determined, after a careful assessment of the extensive record evidence in light of its judicial experience and common sense, that AIG's proffered evidentiary basis for its claims to have been defrauded as a bidder or as a holder of a right of first refusal rested on inferences that were too speculative and unreasonable to be plausible.[2]

In reversing these determinations, the Ninth Circuit did not express disagreement with the district court's predicate findings but instead concluded that the district court acted "prematurely" in determining that AIG's claims were not plausible. In so doing, the Ninth Circuit necessarily rejected the notion that the district court could undertake at the summary judgment stage the type of plausibility-driven assessment

[2] The district court concluded that AIG's theory "does not even come close to establishing a genuine issue of material fact as to whether it is reasonably certain that the Commissioner would have selected (or the Rehabilitation Court would have approved) [AIG's] hypothetical non-conforming bid." App. 73a n.26. The Ninth Circuit concluded that "[d]espite the possible existence of many alleged contingencies, the occurrence of which Defendants argue AIG would be called upon to prove at trial, the district court . . . erred when it prematurely determined that AIG's sought-after damages were impermissibly speculative." App. 5a.

it performed. Petitioners are thus complaining about the Ninth Circuit's interpretation and application of Rule 56, which necessarily entailed a rejection of the district court's analytical method in deciding that AIG's fraud claims did not present genuine issues of material fact for jury consideration.

The reasons supporting a plausibility analysis at the Rule 12 stage articulated in *Twombly* and *Iqbal* apply with equal if not greater force at the Rule 56 stage; this Court should take this opportunity to harmonize the applicable standards and endorse the district court's gatekeeper role at each stage.[3] For these reasons, the Ninth Circuit's determination presents an important question warranting review concerning the district courts' authority under Rule 56.

AIG also argues that Petitioners waived their argument concerning the district court's plausibility analysis because the standards described in *Iqbal* and *Twombly* were not argued below. Opp. 21.[4]

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[3] Even AIG does not contend that such an extension of *Iqbal* and *Twombly* is inappropriate for this Court's review. Opp. 21-22.

[4] The cases AIG cites for this proposition, Opp. 21, are inapposite. In each, this Court refused to rule on an issue or argument that was not presented to the court of appeals. *See F.C.C. v. Fox Television Stations, Inc.*, 129 S. Ct. 1800, 1819 (2009) (declining to address issue presented to court of appeals on which the lower court had not ruled); *United States v. United Foods, Inc.*, 533 U.S. 405, 416-417 (2001) (refusing to consider issue not presented to court of appeals); *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1, 6-8 (1993) (discussing parties' failure to raise statutory and regulatory grounds for decision and explaining that Court will not invoke the rule of avoiding constitutional issues where alternative grounds for decision were not raised below). Here, in contrast, the proper standard for summary judgment determinations and the plausibility

However, it is the Ninth Circuit's holding—not the district court ruling—that creates the conflict with *Iqbal* and *Twombly*. The district court properly invoked the concept of plausibility in concluding that the series of speculative inferences necessary to AIG's fraud claims rendered them subject to summary judgment. App. 48a. On appeal, while the district court's analysis and the proper standards for summary judgment were presented and discussed in Defendants' briefs, CDR Br. 27; App. 47a-48a, as AIG concedes, Opp. 21, AIG did not challenge the district court's authority to consider the plausibility and reasonableness of the inferences to be drawn. Thus, the issue arose for the first time when the Ninth Circuit ruled that the plausibility determinations reached by the district court were "premature" at the summary judgment stage.

Furthermore, the fact that *Iqbal* and *Twombly* were not cited in the principal briefs below also does not act as a "waiver" or render this Court's decisions non-binding on the Ninth Circuit. *See Metavante Corp. v. Emigrant Savings Bank*, 2010 WL 3385961, *19 n.20 (7th Cir. 2010) (noting that failure to cite a relevant case "does not work a waiver. A litigant may cite new authority on appeal."); *see also United States v. Virginia*, 518 U.S. 515, 596 (1996) (Scalia, J., dissenting) ("[The Supreme Court's] principal function is to establish *precedent*—that is, to set forth principles of law that every court in America must follow."). The issues in the question presented were thus clearly before and necessarily decided by the Ninth Circuit. As a result, there has been no waiver and the issue is properly presented for review.

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rulings made by the district court in light of that standard were presented to the Ninth Circuit. CDR Br. 27; App. 47a-48a.

II. Whether a District Court May Decline to Credit Allegations in an Amended Complaint That Contradict Allegations in the Prior Complaint Involves a Circuit Conflict and Merits Review

The Ninth Circuit concluded that the district court erred when it refused to credit AIG's tactical amendment of its allegations concerning when it first learned of its claims. App. 7a; Pet. 29.

The salient facts are that: (1) AIG alleged both in its initial complaint below and in a verified pleading in related litigation that it learned of its claims more than two years before the two-year limitations period on its tortious interference claims was tolled and (2) AIG does not contest that it amended its complaint to allege that it learned of its claims after the limitations period was tolled only following a pre-motion conference with Defendants' counsel in which they identified the fatal defect in AIG's claims. The district court refused to credit this bald tactical amendment and rejected AIG's tortured explanation of why its amendment, effectively changing "before" to "after," purportedly did not conflict with its earlier allegation of when it learned of its claims. Because the explanation offered by AIG for its amended, conflicting allegation was implausible and the only purpose of the conflicting amendment was to forestall dismissal, the district court properly refused to give effect to it.

AIG asserts that the court of appeals reversed the district court's dismissal of these claims because it found AIG's initial allegation and its amended allegation were not contradictory. Opp. 27. Thus, AIG contends, the question of a district court's authority

to refuse to credit an amended allegation is not presented here. AIG is again wrong.

In reversing the district court's Rule 12 dismissal of AIG's tortious interference claims, the Ninth Circuit held that the district court "prematurely" resolved issues of fact, namely the conflicting allegations of when AIG first learned of its claims. Pet. 29. In so doing, the Ninth Circuit necessarily held that the district court lacked authority under Rule 12 to refuse to credit the allegation in the amended complaint even where that allegation conflicted with an allegation in the prior complaint and no plausible explanation was offered for the conflict. AIG's contention that the court of appeals' decision "reflects no legal ruling," Opp. 27, is thus patently incorrect.

Moreover, there is a circuit split on this issue.[5] AIG denies existence of the conflict, Opp. 28-30, but even under AIG's construction, *PAE Gov't Servs. v. MPRI, Inc.*, 514 F.3d 856 (9th Cir. 2007), and *Bradley v. Chiron Corp.*, 136 F.3d 1317 (Fed. Cir. 1998), are in conflict. According to AIG, *PAE* held that a district court "has no authority under Rule 12 to dismiss or strike allegations in an amended complaint because they conflict with allegations in an earlier complaint." Opp. 29; *see also PAE*, 514 F.3d at 859 (concluding that district court has no authority, apart from Fed. R. Civ. P. 11, "to strike pleadings simply because it believes that a party has taken inconsistent positions in the litigation"). Yet, as AIG concedes, *Bradley* rests on the contrary proposition that a court may, under Rule 12, strike or disregard alle-

[5] Petitioners' use in the Petition of the term "apparent" in describing this split was not meant to dilute the conflict in authority.

gations in an amended complaint on the ground that they are inconsistent with allegations in a prior complaint. *See* Opp. 29. These holdings cannot be reconciled as to the district court's authority under Rule 12.

For the reasons set forth in the Petition, this Court should grant certiorari to clarify that authority and resolve the conflict. Doing so is particularly important in light of the requirement that a district court ruling on a motion to dismiss under Rule 12(b) must assess the plausibility of allegations in a complaint in the context of the case using its judicial experience and common sense. *Iqbal*, 129 S. Ct. at 1950; *Twombly*, 550 U.S. at 570.[6] Where, as here, the evident purpose and effect of an amendment to a pleading is to prevent dismissal of a complaint on statute of limitations grounds, a district court should not be required to view the amendment in a vacuum, but should be able to consider relevant context and whether the explanation offered for the amendment is plausible in determining whether to credit it in ruling on a motion to dismiss.

III. This Case Is Not Inappropriate for Review As Interlocutory

Finally, AIG erroneously asserts that this case is interlocutory and therefore inappropriate for this Court's review because, among other things, it was remanded by the court of appeals. Opp. 30.[7] Under

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[6] AIG again erroneously asserts, Opp. 28, that Petitioners waived the issue of applying *Iqbal* and *Twombly* to this question because those cases were not cited below. *See supra* at 7.

[7] Equally erroneous is AIG's suggestion that no review is appropriate because the decision below was unpublished. This Court has reviewed unpublished decisions, and the Ninth Cir-

AIG's theory of interlocutory appeals, *no* case reversed and remanded for trial by a court of appeals would ever be ripe for review by this Court. But, as reflected in this Court's Rule 12 and Rule 56 jurisprudence, the Court has repeatedly granted certiorari to review decisions by appellate courts reversing grants of summary judgment or dismissal of claims.[8] *See, e.g., Celotex v. Catrett*, 477 U.S. 317 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986); *Matsushita v. Zenith Radio*, 475 U.S. 574 (1986); *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007).[9]

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cuit cannot avoid review of its decisions simply by declining to publish them. *See, e.g., Los Angeles County, California, et al. v. Rettele, et al.*, 550 U.S. 609 (2007) (per curiam) (reviewing unpublished court of appeals' decision); *Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424 (2001) (reviewing unpublished court of appeals' decision); *see also* Fed. R. App. P. 32.1 (court may not prohibit or restrict citation of federal judicial opinions).

[8] In addition, while not relevant to an assessment of the worthiness for certiorari of the questions presented, that AIG's breach of contract claim is not directly addressed in the questions does not mean that the claim would ultimately survive review by this Court. As noted in the Petition, all of AIG's claims require it to establish the necessary element of causation. A determination by this Court that the district court used the correct legal standard in granting summary judgment to Defendants on AIG's defrauded holder of a right of first refusal claim would apply with equal force to AIG's breach of contract claim, as it is also predicated upon AIG's purported right of first refusal. The contract claim is not addressed in the Petition because Petitioners do not believe the Ninth Circuit's holding as to that claim presents issues meriting this Court's review.

[9] The cases AIG cites are inapposite. *See Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251 (1916) (ruling requiring further consideration by district court of an issue is not a final decree as to that issue, and ordinarily will not be

Respectfully submitted,

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